Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. _____.

JAMES F. SEXTON
Petitioner,

vs.

CITY OF TWINSBURG,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

JAMES F. SEXTON,
2487 Noble Road, Cleveland Heights, Ohio 44121
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Attorney for Petitioner

24 pp

QUESTIONS PRESENTED

1. Is it a denial of the Due Process and Equal Protection Clauses of the Fourteenth Amendment for the appellate courts of a State to deny review to a litigant on the merits of his case by refusing to consider the evidence in a Narrative Statement of Evidence on the ground that it was not submitted to and approved by the trial court where adverse party fails to object to or propose amendments to the Narrative Statement as permitted by rule, and the appellate court is empowered by rules to correct the omissions, thus raising a presumption of correctness of the evidence in the Narrative Statement.

2. Is it a denial of the Due Process and Equal Protection Clauses under the Fourteenth Amendment to the United States Constitution where the appellate courts of a state deny to a litigant an appellate review on the merits of his case.

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Constitution of the United States, Fourteenth Amendment

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994
NO._____

JAMES F. SEXTON,
Petitioner
vs.
CITY OF TWINSBURG
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, James F. Sexton, respectfully prays that a Writ of Certiorari issue to review the judgement of the Supreme Court of Ohio entered in the proceedings on August 24, 1994, denying petitioner's Motion for Reconsideration of the Supreme Court's denial in Case No. 94-744, of Petitioner's Motion to Certify in that case. An extension of time to and including January 21, 1995, was granted to Petitioner.

OPINIONS BELOW

The order of the Supreme Court of Ohio denying petitioner's Motion to Certify was entered on July 13, 1994, as appears in Appendix A of this petition. Petitioner filed a timely Motion for Reconsideration, which was denied on August 24, 1994, as appears in Appendix B of this petition. The opinion of the Ohio Court of Appeals is unreported and appears in Appendix C of this petition. The

opinion of the Court of Appeals denying petitioner's application for rehearing is unreported and appears in Appendix D.

JURISDICTION

Petitioner's timely Motion for Reconsideration from the judgement of the Supreme Court of Ohio entered on July 13, 1994, was denied on August 24, 1994. On November 21, 1994, an extension of time to file this Petition for Certiorari was granted to and including January 21, 1995. This Court's jurisdiction is invoked under Title 28, Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision is the Fourteenth Amendment, Section 1, to the Constitution of the United States, which appears in Appendix E of this petition.

STATEMENT OF THE CASE

This case originated in the Cuyahoga Falls Municipal Court of Ohio. Petitioner was driving eastbound on an Ohio Interstate highway. A westbound automobile made an illegal U-turn on an emergency vehicle turnaround directly into petitioner's path, causing a collision. The other automobile was cited for an illegal U-turn. Petitioner was cited for not maintaining his car under control for the assured clear distance ahead. Petitioner entered a plea of not guilty on the ground that the other car cut down his assured clear distance ahead. The Cuyahoga

Falls Municipal Court entered a finding of guilty and denied petitioner's motion for a new trial. Petitioner appealed to the Ohio Court of Appeals, Ninth Judicial District.

Prior to trial, petitioner timely filed a motion, in compliance with local rules, to have the proceedings tape-recorded. However, when Petitioner requested a copy to have it transcribed for appeal, the copy could not be transcribed because a humming noise interfered with the sound. Petitioner then requested the original and a second copy. The same humming noise made it impossible to transcribe the second copy and a substantial portion of the original had been erased.

Petitioner then pursuant to the Ohio Appellate Rules filed a Narrative Statement of Evidence with the clerk of the Cuyahoga Falls Municipal Court. The Respondent City of Twinsburg failed to file any objections or propose any amendments, as the Appellate Rules permitted it to do. The result is that there was no dispute between the parties as to the evidence before the trial court.

Ohio Appellate Rule 10(a) requires the clerk of the trial court to submit the record to the clerk of the Court of Appeals when the record is *complete* for purposes of appeal. Ohio Appellate Rule 10(b) states that the record is complete when it has been settled and approved by the trial court and filed with the clerk of the trial court. In this case, the record was submitted by the clerk of the trial court to the clerk of the Court of Appeals without the Narrative Statement of

Evidence having been submitted to the trial court for approval.

On appeal, the Ohio Court of Appeals thereupon refused to consider the evidence in the Narrative Statement and sustained the judgement of the Cuyahoga Falls Municipal Court without considering the merits of the case. This issue had not been raised by the Respondent by brief. And it had not been raised by the Court of Appeals at the time of oral argument. It arose for the first time when the Court of Appeals decided the case. Petitioner as a result filed an Application for Reconsideration in the appellate court and pointed to Ohio Appellate Rule 9(e), which in pertinent part states:

> "If anything material to either party is omitted from the record by error or accident or is misstated therein, the Court of Appeals, on proper suggestion or on its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted."

The appellate court denied the Petitioner's Application for Reconsideration and never addressed this Rule.

As to the Narrative Statement that was filed, it must be emphasized that the Respondent failed to object or propose any amendments. There has never been any question raised either by the Respondent or by the appellate judges as to the correctness of the Narrative Statement filed by the Petitioner.

The total result of what was done by the Ohio Court of Appeals was to deny

Petitioner an appellate review on the merits of his case. Petitioner in the Court of Appeals and in the Supreme Court of Ohio raised the question of a denial of a merit review of the evidence as a denial of due process and equal protection under the Fourteenth Amendment to the Constitution of the United States of America. He did this in the Court of Appeals in his Application for Reconsideration. In the Ohio Supreme Court, this was done by propositions of law in Petitioner's Memorandum in Support of Jurisdiction filed in the Supreme Court. The jurisdictional memorandum was denied on July 13, 1994, by the Ohio Supreme Court, as appears in Appendix A of this petition. The Reconsideration Memorandum in the Ohio Supreme Court was denied on August 24, 1994, as appears in Appendix B of this petition.

REASONS FOR GRANTING THE WRIT

It is fundamental under the Due Process and Equal Protection Clauses in the Fourteenth Amendment that the judicial system of a State accord "due process" and "equal protection" to any person subject to a criminal prosecution, be it for murder or for a traffic violation. Actually it is the latter that affects the greater number of people; and more important than the offense is the rule of law, and the Fourteenth Amendment embodies a rule of law.

In any criminal prosecution there must be evidence to support the trial court's findings. See *Thompson v. Louisville*, 362 U.S. 199. At page 206, Justice Black states:

> "Just as 'Conviction on a charge not made would be sheer denial of due process,' so it is a violation of due process to convict and punish a man without evidence of his guilt."

Douglas v. Buder, Judge, 412 U.S. 430 (1973), and *Barr v. City of Columbia,* (1964) 378 U.S. 146 are to the same effect. These cases hold that it is a violation of the Due Process and Equal Protection Clauses where there is no evidence to sustain a finding of guilty. The long and short of Petitioner's contention in this case is that there was a complete lack of evidence to support the finding of the Cuyahoga Falls Municipal Court. This brings the case to the appellate process and the obstacles which this Petitioner encountered.

Once a State establishes an appellate process, that process becomes part and parcel of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In the appellate process that a State establishes, it is fundamental that it be available equally to everyone. That is the basic holding in *Griffin v. Illinois,* 351 U.S. 12. The cases to this affect are many. Without becoming redundant in the citation of cases, Petitioner merely refers to *Burns v. Ohio,* 360 U.S. 252. In this case, a defendant was denied a review in the Ohio Supreme Court because of the failure to pay the filing fee, which the defendant asked to be waived on the ground of indigency. This United States Supreme Court reversed, holding that to deny the appellate process to the defendant was a denial of due process and equal protection under the Fourteenth Amendment.

Petitioner refers to *Lewis v. Connor*, (1985), 21 Ohio St. 3d 1. Justice Wright of the Ohio Supreme Court, in a concurring opinion, at page 5 states:

> "I briefly concur to draw the attention of the bench and the bar to the recent trend of cases emanating from this court which makes it clear that when appropriate this court will construe the Ohio Rules of Civil Procedure and other rules to insure that controversies are decided on their merits rather than on overly technical application of the rules which would lead to a dismissal."

Justice Wright adds a footnote in his concurring opinion, which cites six other Ohio cases which follow this principle. This is a principle of due process and equal protection which *Griffin v. Illinois*, supra, and other rulings of this United States Supreme Court, represent. Yet the Ohio ruling in this case now fail to follow even their own due process rulings.

Petitioner refers to Rule 10 of the Rules of the Supreme Court of the United States: Considerations Governing Review on Writ of Certiorari. The Rule states that a petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor. The Rule then indicated the character of reasons that will be considered. Rule 10(c) states one of the reasons to be:

> "(c) When a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court, or

has decided a federal question in a way that conflicts with applicable decisions of this court." (Emphasis added).

Petitioner submits that the Ohio Supreme Court's decision is in complete conflict with due process and equal protection prinicples enunciated both by this Court and by the Ohio Supreme Court itself.

Petitioner also refers to Rule 10(a) and submits that the Ohio courts have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgement and decision of the Supreme Court of Ohio in this matter.[1]

DATED: January 21, 1995

Respectfully Submitted,

James F. Sexton,
Petitioner

---

[1] If this court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the

Supreme Court of Ohio for remand to the Court of Appeals, Ohio Ninth Judicial District, for submission of Petitioner's Narrative Statement to the trial court and certification to the Ninth Judicial District Court of Appeals for decision on the merits of petitioner's case.

THE SUPREME COURT OF OHIO

1994 TERM

City of Twinsburg Appellee,	)	To wit: July 13, 1994
	)	Case No. 94-744
v.	)	
	)	ENTRY
James F. Sexton, Appellant	)	

Upon consideration of the jurisdictional memoranda filed in this case, the court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket fee, $40.00, paid by James Sexton.

(Summit County Court of Appeals; No. 16306)

Thomas J. Moyer
Chief Justice

APPENDIX A

THE SUPREME COURT OF OHIO

1994 TERM

City of Twinsburg Appellee,	)	To wit: August 24, 1994
	)	Case No. 94-744
v.	)	
	)	RECONSIDERATION
James F. Sexton, Appellant	)	ENTRY
	)	(Summit County)

IT IS ORDERED by the Court that reconsideration in this case be, and the same is hereby, denied.
(Court of Appeals No. 16306)

Thomas J. Moyer
Chief Justice

APPENDIX B

STATE OF OHIO	)	IN THE COURT OF
	) SS:	APPEALS NINTH
COUNTY OF SUMMIT)		JUDICIAL DISTRICT
CITY OF TWINSBURG	)	C.A. NO. 16306
	)	
Appellee	)	
v.	)	APPEAL FROM JUDGEMENT
JAMES F. SEXTON	)	ENTERED IN THE
Appellant	)	CUYAHOGA FALLS
	)	MUNICIPAL COURT
	)	COUNTY OF SUMMIT,
	)	OHIO
	)	CASE NO. 92 TRD 27102

DECISION AND JOURNAL ENTRY

Dated: February 9, 1994

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made.

BAIRD, J. This cause was heard upon the appeal of James F. Sexton from an order of the Cuyahoga Falls Municipal Court finding him in violation of Twinsburg Codified Ordinance 333.03, failure to pay a fine of $25.00 plus court costs. We affirm.

On November 21, 1992, Sexton was travelling eastbound on Interstate 480 when his car was involved in a collision with another vehicle, driven by Staci Nolan. Nolan was travelling westbound on Interstate 480 and made an illegal U-turn on an emergency turnaround. Nolan entered the eastbound lane in which Sexton was

travelling and, after several lane changes by both vehicles, apparently to avoid a collision, an accident occurred. The investigating police officer issued citations to Nolan for the illegal U-turn and to Sexton for failure to maintain an assured clear distance.

At trial, Sexton argued that Nolan had unexpectedly entered his lane, cutting down his assured clear distance, and causing the accident. Sexton argued that because Nolan had pulled into the path of his oncoming vehicle, he was not guilty of failing to maintain an assured clear distance.

The municipal court found him guilty of failing to maintain an assured clear distance. Sexton moved for a new trial, which was denied. It is from this order that Sexton now appeals, asserting six assignments of error.

ASSIGNMENT OF ERROR 1

> "The trial court erred in failing to make available to Defendant-Appellant a complete transcribable tape recorded copy or original of the tape recording taken at the time of trial."

Prior to trial, Appellant timely filed a motion, in compliance with local rules, to have the proceedings tape recorded. The proceedings were recorded. However, when Appellant requested a copy so he could have it transcribed for purposes of the

appeal, the copy could not be transcribed because a humming noise interfered with the sound. Appellant then requested the original recording and a second copy. The second copy had the same humming sound, and although most of the original could be deciphered, part of it had been erased. Appellant argues that the trial court erred in not providing him with a transcribable copy of the recording of the proceedings.

App.R. 9(C) outlines the correct procedure which an appellant must follow in order to perfect the record, in cases where a transcript of proceedings is not available. It provides:

> "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record ***, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval."

This rule anticipates situations where, through accident, inadvertance, or error, a transcript is not available. The rule provides sufficient recourse to an appellant who finds himself confronted

with an incomplete record, due to a problem with the recording of the proceedings. As the App.R. 9(C) procedure for substituting a statement of proceeding for an unavailable transcript was available to the appellant, the first assignment of error is overruled.

ASSIGNMENT OF ERRORS

2. The trial court erred in failing to grant defendant-appellant's notice for a directed verdict.

3. The trial court erred in failing to accept and mark into evidence the copy of the Certificate of Title pertaining to Miss Staci Nolan's automobile.

4. The trial court erred in failing to find for the defendant-appellant when the City of Twinsburg failed to sustain its burden of proof by sufficient evidence.

5. The trial court erred in failing to decide in defendant-appellant's favor on the manifest weight of the evidence.

6. The trial court erred in denying defendant-appellant's motion for a new trial.

Appellant's remaining assignments of error all address specific pieces of evidence or the sufficiency of the evidence presented. As noted above, a transcript of the proceedings was not available. Appellant attempted to cure this defect by filing an App.R. 9(C) statement of proceedings. However, App.R. 9(C) requires

that an appellant engage in a three-step process, in order to file a proper statement of the proceedings. First, an appellant must prepare and serve on the appellee a copy of appellant's statement. Next, the appellee may make and serve objections or propose amendments to the statement. Finally, the statement and any objections or proposed amendments must be submitted to the trial court for approval.

In this case, Appellant has not filed a proper statement of proceedings. Although he prepared and served a copy of his statement and appellee made no objections to that statement, the statement was never submitted to the trial court for approval. As the trial court has not signed the statement of proceedings filed with this court, the statement cannot be relied upon as an accurate account of what took place at trial. Therefore, we cannot review the merits of Appellant's remaining assignments of error.

The judgement of the trial court is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit, Cuyahoga Falls Municipal Court, to carry this judgement into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal

entry of judgement, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellant.

Exceptions.

William R. Baird
For the Court

REECE, P.J.
QUILLIN, J.
CONCUR

APPEARANCES:

GARY ANDRACHIK, Attorney at Law, 10075 Ravenna Road, Twinsburg OH 44087 for Appellee.

JAMES F. SEXTON, Pro Se, 2487 Noble Road, Cleveland Heights OH 44121 for Self, Appellant.

APPENDIX C

ORDER DENYING APPLICATION FOR RECONSIDERATION

STATE OF OHIO	)	IN THE COURT OF
	) SS:	APPEALS NINTH
COUNTY OF SUMMIT)		JUDICIAL DISTRICT
CITY OF TWINSBURG	)	C.A. NO. 16036
Plaintiff-Appellee	)	
	)	
v.	)	
	)	
JAMES F. SEXTON	)	JOURNAL ENTRY
Defendant-Appellant)		

This cause was heard upon the motion of James F. Sexton to reconsider this court's decision and journal entry dated February 9, 1994. In that decision, we affirmed the Cuyahoga Falls Municipal Court's order finding Sexton guilty of failure to maintain an assured clear distance. This decision was based largely on the fact that a proper App.R. 9(C) statement had not been filed by Sexton as a substitute for the transcript of proceedings.

Sexton now asks that we reconsider that decision and argues that App.R. 9(C) and 10 do not place the burden upon the Appellant to see that the trial court approves a submitted statement of proceedings. We disagree. The burden is on the Appellant to provide the necessary record to establish his assigned errors. *Knapp v. Edwards Laboratories*, (1980), 61 Ohio St.2d 197, 199. "Upon appeal of an adverse judgement, it is the duty of the Appellant to ensure that the record, or whatever portions thereof are necessary

for the determination of the appeal, are filed with the court in which he seeks review." *Rose Chevrolet, Inc. v. Adams*, (1988), 36 Ohio St.2d 17, 19, citing App.R. 9 and 10.

As Sexton did not meet his burden in this case, the motion for reconsideration is denied.

William R. Baird
Judge

Daniel B. Quillin
Judge

John W. Reece
Judge

cc: Gary Andrachik, Attorney for Appellee, 10075 Ravenna Road, Twinsburg OH 44087

James F. Sexton, Pro Se, 2487 Noble Road, Cleveland Heights OH 44121

APPENDIX D

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born in or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
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(2)

No. 94-1255

In The

Supreme Court of the United States

October Term, 1994

JAMES F. SEXTON,

Petitioner,

vs.

CITY OF TWINSBURG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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February 15, 1995

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QUESTIONS PRESENTED

1. Is it a denial of the Due Process and Equal Protection Clauses of the Fourteenth Amendment for the appellate courts of a State to deny review to a litigant on the merits of his case by refusing to consider the evidence in a Narrative Statement of Evidence on the ground that it was not submitted to and approved by the trial court where adverse party fails to object to or propose amendments to the Narrative Statement as permitted by rule, and the appellate court is empowered by rules to correct the omissions, thus raising a presumption of correctness of the evidence in the Narrative Statement.

2. Is it a denial of the Due Process and Equal Protection Clauses under the Fourteenth Amendment to the United States Constitution where the appellate courts of a state deny to a litigant an appellate review of the merits of his case.

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No. 94-1255

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JAMES F. SEXTON,

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vs.

CITY OF TWINSBURG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent City of Twinsburg respectfully requests that the Court deny the petition for Writ of Certiorari submitted by petitioner.

OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's identification as to Opinions below, Jurisdiction of the Court and Statutory Provisions Involved.

STATEMENT OF THE CASE

Petitioner James F. Sexton was charged with a violation of Twinsburg Codified Ordinance 333.03, Failure to Maintain an Assured Clear Distance.

After Mr. Sexton entered a plea of not guilty, this matter was tried to the Court in Cuyahoga County Falls Municipal Court. Trial Court rendered a finding of guilty and fined the Petitioner $25.00 and costs. Petitioner filed a motion for a new trial which was denied.

Thereafter, petitioner appealed to the Court of Appeals, Ninth Judicial District. Both his appeal and a Motion for Reconsideration were denied. Petitioner failed to follow Appellate Rule 10(B) which states that the record to be complete must be submitted and approved by the trial court and filed with the clerk of the trial court.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because petitioner has failed to establish a basis for review by this Court. Appellate Rule 9(C) imposes upon petitioner the affirmative duty to provide a complete record. Failure to do so is proper grounds for dismissal.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

I. APPELLATE RULE 9(C) IMPOSES UPON PETITIONER THE AFFIRMATIVE DUTY TO INSURE THE STATEMENT OF EVIDENCE AND ANY OBJECTION IS SUBMITTED TO TRIAL COURT FOR SETTLEMENT AND APPROVAL, AND FAILURE TO DO SO IS GROUNDS FOR DISMISSAL OF THE APPEAL.

In the case at bar, a transcript of what had occurred in the trial court was not available for reasons stated earlier. Therefore, Petitioner availed himself of the relief provided under Appellate Rule 9(C). Briefly stated, Petitioner had the duty to prepare a statement of evidence and serve same on Respondent for his approval. Thereafter, the rule states that the statement and any objection of the proposed amendments shall be forthwith submitted to the trial court for settlement and approval. After the trial court has approved the statement, the rule provides that the statement shall be included by the Clerk of Court for the record on Appeal.

A clear and logical reading of Appellate Rule 9(C) in its entirety indicates that certain requirements are imposed upon petitioner to properly prepare the record for appeal. Not only must he prepare such a statement of the evidence and serve same upon respondent, the statement must be submitted forthwith to the trial court for its review. Nowhere in this rule can it be implied that this duty is imposed upon the Clerk of the trial court as petitioner alleges. The Court of Appeals for the Ninth

Judicial District clearly and correctly failed to accept Petitioner's argument that this burden was not upon Petitioner. As stated in the matter of *Knapp v. Edwards Laboratories,* 62 Ohio St. 2d 197 (1980):

> Upon appeal of an adverse judgment, it is the duty of the petitioner to insure that the record or whatever portions thereof are necessary for determination of the appeal filed with the court in which he seeks relief.

Rose Chevrolet Inc. v. Adams, 36 Ohio St. 3rd 17 (1988).

In *Knapp,* the court stated that the duty to provide a transcript for appellate review falls upon the petitioner. This is necessarily so because a petitioner bears the burden of showing error by reference to matters in the record. See *State v. Skaggs,* 3 Ohio St. 2d 162 (1978).

The burden in the case cited by Petitioner is clearly distinguishable from the issue at hand. In *Cobb v. Cobb,* (1988) 62 Ohio St. 2d 124, the clerk failed to include an item in the record after petitioner had filed the proper parricide. The Supreme Court stated that the omission was based on the nonfeasance of the trial court clerk and thus relief under Appellate Rule 9(E) was appropriate. Thus, in *Cobb,* petitioner had correctly made the request of the trial court clerk, but the clerk had failed to properly follow the instructions given.

However, in the case at hand, petitioner himself failed to affirmatively comply with the clear mandates of Appellate Rule 9(C). A reading of that section reveals that Petitioner has the burden of doing certain items, including submitting the statement for approval by the trial court. Thereafter, the burden is placed upon the clerk of

the trial court to include that item plus all other items in the record on appeal.

Thus, since Petitioner failed to follow the dictates of Appellate Rule 9(C), the Appellate Court correctly stated that Petitioner did not meet his burden and that the Motion for Reconsideration is thus denied.

CONCLUSION

For the reasons stated above, respondent respectfully requests that the relief sought by Petitioner should be denied.

Respectfully submitted,

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Counsel for Respondent

February 15, 1995

No. 94-1253

In the Supreme Court of the United States

OCTOBER TERM 1994

JAMES F. SEXTON
Petitioner,

vs.

CITY OF TWINSBURG,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioner's Reply Brief

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Attorney

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No. 94-1255

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES F. SEXTON
Petitioner,

vs.

CITY OF TWINSBURG,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioner's Reply Brief

Petitioner first notes error in the caption on respondents brief in opposition. The petition is for a writ of certiorari to the Supreme Court of Ohio and not to the United States Court of Appeals for the Seventh Circuit.

Petitioner timely filed a motion for a tape recording of the trial court proceedings. The proceedings were tape recorded. Petitioner received a copy of the recording that was not transcribable. Next a portion of the original tape recording is destroyed. Petitioner was forced to resort to a Narrative Statement of Evidence. Respondent did not object to or propose any amendments to Petitioner's Statement,

so there was no dispute between the parties as to the evidence before the trial court. The clerk of the trial court submitted the Narrative Statement to the clerk of the court of appeals without first submitting it to the trial court for settlement and approval. Because it had not been submitted and approved, the appellate court then refused to consider the evidence in the Narrative Statement and sustained the judgement of the trial court.

Ohio Appellate Rule 10(A) requires the trial court clerk to submit a complete record to the clerk of the appellate court. Rule 10(B) states that it is complete when it has been settled and approved by the trial court. Rules 10(A) and 10(B) in effect impose the duty on the trial court clerk to submit the Narrative Statement for settlement and approval prior to submitting it to the clerk of the court appeals. Respondent contends that the Appellate Rule 9(C) imposes the duty of the petitioner. That is not true. In either event, Appellate Rule 9(E), which in pertinent part appears on page 4 of the Petition and is repeated here, states:

> "***If anything material to either party is omitted from the record by error or accident or is misstated therein, *** the court of appeals on proper suggestion or on its own initiative may direct that omission or mistatement be corrected, and if necessary be certified and transmitted.***"

In effect the appellate court is empowered to make any corrections that are necessary, especially where the facts are not in dispute between the parties.

In this background, the basic issue is whether the judicial interpretation of these Rules has denied petitioner the "due process" and "equal protection" to which he is entitled under the Due Process and Equal Protection Clauses of the Fourteenth Amendment in a situation where there never has been a dispute as to the facts as presented by the Narrative Statement.

Petitioner's contention is that there is no evidence in the Narrative Statement to sustain the finding of the Cuyahoga Falls Municipal Court. Where there is no evidence to support a finding, this is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See Thompson v. Louisville, 362 U.S. 199 (1960). Also see Douglas v. Bader, Judge, 412 U.S. 430 (1973) and Barr v. City of Columbia, 378 U.S. 146 (1964). These cases were cited by petitioner in his Petition and bear repeating. They never were addressed by Respondent in its brief in opposition. It is basic that evidence is necessary to support a finding. And here there was no such evidence. The denial of a review of the evidence under these circumstances is a denial of due process and equal protection.

Once a State establishes the appellate process, it must be equally available to everyone. This is the holding in Griffin v. Illinois, 351 U.S. 12 (1956). See also Burns v. Ohio, 360 U.S. 252 (1959). These cases were cited by petitioner in his petition and again they bear repeating. Respondent never addressed them in its brief in opposition. To deny petitioner an appellate review on the merits of his case is a denial of the appellate process. And there is no dispute that petitioner has been denied an appellate review on the merits of his case. This is contrary to the

requirements of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

For the reasons set forth above and in his petitition for an writ of Certiorari petitioner submits that a writ of Certiorari should issue to review the judgement and decision of the Supreme Court of Ohio in this matter.

Respectfully Submitted,

James F. Sexton
Petitioner